BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSHUA BURCH	)	
Claimant	)	
	)	
VS.	)	
	)	
ASPLUNDH TREE EXPERT COMPANY	)	
Respondent	)	Docket No. 1,048,866
	)	
AND	)	
	)	
LIBERTY MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 21, 2011, preliminary hearing Order entered by Administrative Law Judge Rebecca A. Sanders. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. James Blickhan, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant's accidental injury arose out of and in the course of his employment with respondent. Because she determined that claimant's injury was the result of a series of repetitive traumas, the ALJ found that claimant's date of accident must be determined by the provisions of K.S.A. 2010 Supp. 44-508(a). The ALJ found claimant's date of accident to be October 4, 2009, the date when claimant's work was restricted. However, the ALJ found that claimant failed to give respondent timely notice of the accidental injury and failed to show just cause for the enlargement of the notice period to 75 days. Accordingly, claimant's request for temporary total disability benefits was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 20, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant asks that the Board affirm the ALJ's finding that claimant's repetitive low back injury arose out of and in the course of his employment. However, claimant requests that the Board reverse the ALJ's finding that claimant failed to provide respondent with timely notice of his accidental injury. Claimant argues that the appropriate date of accident is January 5, 2010, the date respondent was sent claimant's Application for Hearing.[1]

Respondent asserts that claimant's medical condition is not the result of his employment but was from a previous accidental injury. Respondent further argues that the Board should affirm the ALJ's finding that claimant failed to provide respondent with timely notice of his alleged accidental injury.

The issues for the Board's review are:

(1) Are claimant's current medical condition and need for treatment and temporary total disability benefits the result of an accidental injury that arose out of and in the course of his employment with respondent?

(2) If so, did claimant give respondent timely notice of his accidental injury?

FINDINGS OF FACT

Claimant worked for respondent as a top trimmer. His job required him to set ropes, go up and down trees, cut branches from trees and handle the branch that had been cut. He would also have to carry brush and load brush and pieces of trees into the back of trucks. When he went to work for respondent in 2008, he was required to have a physical examination, which he passed.

Claimant testified that about six months after he started working for respondent, he noticed his back was bothering him. He continued to work after the back problems started, and his back problems gradually got worse. Claimant said he told several of his foremen that his back was bothering him because of the work he was performing. Claimant said the general foreman, Tracy Schmidt, told him he needed to have an exact date of accident before he could write up a report of accident. But claimant did not have an exact date because the problem developed over a period of time. Respondent did not send him to a doctor, and eventually claimant, on his own, went to a chiropractor; Dr. Harl, a medical doctor; and a medical clinic, K-Stat.

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[1] Claimant filed a Form K-WC E-1 Application for Hearing with the Division of Workers Compensation on January 4, 2010, alleging a "[s]eries [of accidents] from 5/4/09 & continuing."

Dr. Harl sent claimant for an MRI in June 2009. Sometime after receiving the results of the MRI, which showed claimant had a herniated disc, one of claimant's physicians gave him restrictions and a slip for light duty work.[2]

On October 5, 2009, claimant, at the request of Mr. Schmidt, filled out and signed a form dated October 5, 2009, which relates:

> I, Josh Burch, reported to my General Foreman Tracy Schmidt that I sustained a Personal injury off the job. The date of the off the job injury [was] about 2 1/2 to 3 year[s] ago.
>
> The nature of the injury
>
> herniated disk in lower back, tore a ligament, bone closing up on my nerves tissue wearing away, always out of alinement [*sic*] high speed car reck [*sic*].
>
> I understand that I will obtain a full release before I return to work for ASPLUNDH.[3]

Claimant admits he wrote out the statement, saying he wrote out what had been on the MRI report. He said that Mr. Schmidt was talking to him and telling him what to write. After claimant wrote down what was on the MRI report, Mr. Schmidt asked him about the high speed car accident and told him to write that down as well. Claimant admitted he should have read the statement, but he was just taking directions. Claimant remembered that Mr. Schmidt said, "That's what they want to hear."[4] Claimant said he was told if he did not sign the statement, he would lose his job. Claimant was terminated by respondent soon after making this statement. His last day worked was October 4, 2009. He testified that his back continued to worsen when he was performing his work activities up through October 4, 2009.

Tracy Schmidt is the general foreperson for respondent and was claimant's supervisor. He identified the form claimant signed on October 5, 2009, as a form respondent uses when an employee sustains an off-the-job injury. Mr. Schmidt denied telling claimant what to write on the statement. Mr. Schmidt testified he did not tell claimant that if he did not fill out the form, he would be terminated. Mr. Schmidt said that claimant had missed days of work in 2009, and in October 2009 claimant brought in a slip from a doctor putting him on light duty. He said he asked claimant about what was causing his back problems, and claimant told him he had been in a high speed car accident and

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[2] The light-duty slip was not made a part of the record. It is not clear what date claimant was given the light-duty slip or which doctor signed the slip. Mr. Schmidt indicated claimant brought him the light-duty slip in October 2009. Claimant testified he received restrictions about two days before he was terminated by respondent.

[3] P.H. Trans., Cl. Ex. 3.

[4] P.H. Trans. at 13.

suffered an injury to his back. Mr. Schmidt said he did not have authority to put claimant on light-duty work for an off-the-job injury.

Mr. Schmidt said that at no time did claimant report an on-the-job injury to him. But he said he knew claimant was having back problems and he knew that claimant had a physical job. If an employee reports an on-the-job injury, the process is to report it to the safety supervisor and Mr. Schmidt's supervisor, and respondent proceeds from there.

Mr. Schmidt said in late October, within 30 days of claimant's termination, he spoke with claimant. Mr. Schmidt testified claimant called and asked if his case could be a workers compensation claim, and he told claimant that based on the prior off-the-job injury, he did not understand how that could be. Mr. Schmidt testified he did not tell claimant that if he did not have a specific date of injury, he could not fill out paperwork for a work-related injury.

Claimant admits being involved in a high speed car accident four or five years ago. He denies injuring his back in that accident, saying he only suffered injuries to his foot and head. Claimant also said he strained his back in 2007 while working for Salina Tree Service. He said he took some medication and was then fine, and his back problem had resolved before starting work at respondent. He did not have an MRI nor was he diagnosed with a herniated disc after either the automobile accident or the back strain in 2007.

Respondent introduced an office note from K-Stat from December 15, 2008, wherein claimant complained of low back pain. Claimant told Dr. Melanie Byram that he had right thoracic pain with a duration of one year. Claimant was again seen at K-Stat on February 6, 2009, with complaints of low back pain. On that date, claimant gave a history of "low back pain intermittently for past 2 years after MVA" that was aggravated by "any type of movement."[5]

Dr. Pedro Murati examined claimant on February 9, 2010, at the request of claimant's attorney. After examining claimant, Dr. Murati diagnosed him with low back pain with signs and symptoms of radiculopathy, which he said were a direct result of the work-related injury of May 4, 2009, and each day worked during his employment with respondent.

Dr. Terence Pratt examined claimant on December 9, 2010, pursuant to the order of the ALJ. Claimant had a chief complaint of low back pain for a duration of a year and a half, which he related to his work. Claimant told Dr. Pratt there was no specific event, but he had symptoms when bending and lifting. Dr. Pratt diagnosed claimant with low back pain with degenerative disc disease, with the MRI of June 15, 2009, showing herniated

[5] P.H. Trans., Resp. Ex. A at 14.

nucleus pulposus at L4-5 and L5-S1. However, Dr. Pratt did not specifically address causation in his December 9, 2010, report.

Dr. Pratt supplemented his report on February 4, 2011. Dr. Pratt noted claimant's statement of October 5, 2009, in which he talked about a previous car accident. Dr. Pratt indicated that if claimant had a prior herniated disc, then the herniated disc identified on the MRI assessment would be related to the prior car accident. "The prior herniated disc would be the most significant factor in his involvement and his need for treatment especially without a specific event occurring in relationship to his vocationally related activities." Dr. Pratt said it was possible claimant had some aggravation of underlying involvement in relationship to his job tasks for respondent, but that it was probable, because claimant reported prior involvement, that the herniated disc was unrelated to his work activities for respondent.

Respondent introduced written statements from employees of respondent, Justin Williams and Devin Viergever. Both indicated that they overheard claimant say his back injury was due to an automobile accident in which he had been involved before going to work for respondent.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

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[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[9] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[10] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[11]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

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[8] *Id.* at 278.

[9] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[10] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[11] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

K.S.A. 2010 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

In *Saylor*,[12] the Kansas Court of Appeals approved a date of accident after a claimant's last day worked, stating:

> . . . [T]he 2005 addition to K.S.A. 2008 Supp. 44-508(d) creates the presumption that the legislature intended to change the date of injury for an "accident" from the bright-line rule of the last day worked. Therefore, giving effect to the express language in K.S.A. 2008 Supp. 44-508(d), which is plain and unambiguous, we find Saylor's date of accident to be March 28, 2006.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

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[12] *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, 1048, 207 P.3d 275 (2009), *rev. pending*.

[13] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[14] K.S.A. 2010 Supp. 44-555c(k).

ANALYSIS

Claimant worked for respondent from May 28, 2008, through October 5, 2009, and suffered a series of accidents and aggravations to his low back. Although claimant had been injured in a motor vehicle accident in 2006, it is not clear what his injuries were from that accident. Dr. Pratt's opinions concerning a preexisting herniated disc appear to be premised upon claimant's handwritten statement to his employer and not from any personal review of any contemporaneous medical records. It seems unlikely that claimant could have performed the type of work he did for respondent with a herniated disc in his low back. Even so, it is probable that those work activities worsened claimant's symptoms and his condition.

Claimant testified that he reported his back problems to his supervisor, Mr. Schmidt, but was not offered authorized medical treatment. Mr. Schmidt acknowledges that he was aware claimant was having back problems during his employment but denies claimant ever informed him those problems were related to his employment with respondent. Mr. Schmidt was aware, nevertheless, of the physically demanding nature of claimant's work with respondent.

The ALJ was correct to utilize the provisions of K.S.A. 2010 Supp. 44-508(d) to determine the date of accident for claimant's series of accidents. However, she was incorrect in finding October 4, 2009, as the accident date. Even though that is the date claimant received work restrictions from a physician, the physician was not an authorized physician as required by the statute. The first triggering event occurred on or about January 5, 2010, when respondent received the claimant's Application for Hearing. This was "the date upon which the employee gives written notice to the employer of the injury."[15] Based upon an accident date of January 5, 2010, notice was timely.

CONCLUSION

(1) Claimant suffered personal injury to his back that arose out of and in the course of his employment with respondent.

(2) Claimant gave respondent timely notice of his accidental injury.

[15] K.S.A. 2010 Supp. 44-508(d).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated April 21, 2011, is affirmed in part and reversed in part and remanded to the ALJ for further orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this _____ day of June, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
James Blickhan, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge